86 1527[3]

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

McCLELLAN REALTY COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

SUPPLEMENT TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Lawrence M. Ludwig (Counsel of Record)
HENKELMAN, KREDER, O'CONNELL & BROOKS
Bank Towers Building
Scranton, Pennsylvania 18503
(717) 346-7922

Joseph R. Solfanelli
Gerald J. Butler
SOLFANELLI & BUTLER
Counsel for Petitioners

Dated: January 22, 1987

INSTRUCTION PAGE

THIS SUPPLEMENT SHOULD BE ADDED TO "EXHIBIT 'A'", BETWEEN PAGES 20 & 21 AS "FINDINGS OF FACT", NUMBERS 26 THROUGH 97.

26. The Chemical Bank loan was guaranteed by Royal Cleveland.

27. The proceeds of the Chemical Bank loan were used to pay off the note given Glen Alden in 1966 by Blue Coal and secured by a mortgage on Blue Coal's lands.

28. During 1973, Blue Coal was technically in default under the working capital provisions of the Chemical Bank mortgage agreement.

29. In 1971, 1972, and 1973, the Raymond Group had serious and chronic cash flow problems because of the very substantial expenditures required for Blue Coal's conversion to strip mining.

30. In 1971, 1972, and 1973, the Raymond Group's cash flow problems were compounded by the fact that its expenses were primarily incurred during the warm season when coal production was greatest and its income was received primarily during the winter season after dealers sold coal and then became obliged to pay for coal purchases made earlier in the year.

31. In 1971, 1972 and 1973, the Raymond Group frequently discounted its accounts receivables to alleviate its cash flow problems.

32. Between 1969 and 1973, the Raymond Group was frequently, if not always, seriously delinquent in the payment of real estate taxes.

33. Taxes were often not paid until after the lands were listed for tax sale.

34. During the five-year period ending November 26, 1973, the trade accounts payable of the Raymond Group were chronically delinquent.

35. In 1973, Raymond Colliery and Blue Coal together employed between 2,000 and 3,000 employees.

36. During the five-year period ending November 26, 1973, the coal production business of the Raymond Group operated at a loss.

37. During the five-year period ending November 26, 1973, the Raymond Group was largely supported by the sales of its surplus lands.

38. The Raymond Group's consolidated statement of income for the year ended June 30,

1971 showed a net loss of $156,533.61.

39. The Raymond Group's consolidated statement of income for the year ended June 30, 1972 showed a net loss of $239,540.45.

40. The Raymond Group's consolidated statement of income for the year ended June 30, 1973 showed a net loss of $2,146,514.96.

41. The unprofitability of the Raymond Group's coal production business led to disagreements between the Gillens and the Clevelands as to the advisability of continuing the coal production business.

42. These disagreements led to the decision during 1972 by the Gillens and Clevelands to sell their Raymond Colliery stock.

43. Thomas J. Gillen, Jr. was charged with finding a buyer for the stock.

44. On February 2, 1972, Royal Cleveland on behalf of the Gillens and Clevelands executed an option for the sale of the stock of Raymond Colliery to James Durkin, Sr. or his nominee for $8,500,000.

45. The Gillens and Clevelands executed at least two extensions of the option agreement with Durkin. Twice the option agreements expired because Durkin was unable to purchase the Raymond Colliery stock.

46. The final option agreement was executed on August 3, 1973 between James Durkin, Sr. and the Gillens and Clevelands.

47. The August 3, 1973 option agreement provided for the sale of Raymond Colliery's stock for $#,200,000. The reduction in price was the result of further negotiations between the parties after Durkin learned of the Raymond Group's substantial liabilities to the Internal Revenue Service.

48. The partner of James Durkin, Sr. in the purchase of the Raymond Colliery stock was James Riddle Hoffa, Sr.

49. Hoffa acted through his counsel, Eugene Zafft.

50. Sometime prior to June 30, 1973, Durkin

incorporated Great American Coal Co. (Great American) and assigned to it his option to purchase the Raymond Colliery stock.

51. Great American was incorporated as a holding company.

52. The major asset of Great American at the time of its incorporation was the option to purchase Raymond Colliery's stock.

53. Fifty percent of Great American's stock was originally owned by Durkin and his wife, Anna Jean Durkin, and 50% was owned by Eugene Zafft as Hoffa's nominee.

54. Durkin and Hoffa, with the aid of Durkin's accountant and financial advisor, Charles Parente, and Durkin's counsel, Rosenn, Jenkins and Greenwald, sought financing during 1972 and 1973 for the proposed purchase of Raymond Colliery's stock. Durkin approached a series of lenders.

55. During 1972 and 1973, Rosenn, Jenkins and Greenwald participated in the Raymond Colliery stock purchase transaction in the joint capacity as counsel for Durkin and as the local agent for

Chicago Title Insurance Co., the proposed title insurance carrier.

56. All of Durkin's larger loan requests were predicated on using the assets o# the Raymond Group as collateral for the loans requested and repayment of the loans and interest thereon from the income and assets of the Raymond Group.

57. In March, 1972, Durkin and Hoffa sought a $13,000,000 loan from the Central States Pension Fund and the Mellon Bank to finance the stock purchase.

58. Rosenn, Jenkins and Greenwald, in their joint capacity as counsel for Durkin and local agent for Chicago Title Insurance Co., had extensive communications with Richard Pollay, Vice President and Divisional Associate General Counsel for Chicago Title Insurance Co., and individuals at the Mellon Bank and the Central States Pension Fund as to the legality of using Raymond Group assets as security for a loan the proceeds of which .would be used to finance at least in part the purchase of Raymond Colliery's stock.

59. Central States Pension Fund made a commitment to finance the purchase of Raymond Colliery's stock. This loan commitment was terminated in part because Durkin failed to pay the required commitment fee and in part because Mellon Bank which was to participate in the loan determined that Blue Coal was financially weak.

60. A loan request made by Durkin to the Chemical Bank for $10,000,000 was denied after officials at the Bank determined that the Raymond Group would be unable to repay the loan in a reasonable time.

61. In July, 1973, Durkin proposed to the Gillens and Clevelands that they accept for the sale of the stock $4,000,000 in cash plus a $4,500,000 note secured by Raymond Colliery and Blue Coal assets.

62. The proposal described in the preceding paragraph was rejected by the Gillens and Clevelands upon the advice of their counsel, Bernard Brown.

63. Brown advised against the proposal

of Benjamin Levinson, a loan broker, were sought by Green. Levinson put Green and Durkin in touch with Institutional Investors Trust (IIT).

68. IIT is a real estate investment trust with headquarters in New York City.

69. IIT is an independent lender and was unrelated to any party to the August 3, 1973 option agreement between Durkin and the Gillens and Clevelands.

70. Durkin sought $7,000,000 to $8,530,000 from IIT to finance the purchase of Raymond Colliery's stock by Great American.

71. Durkin, Zafft, and Green concealed from IIT Hoffa's ownership interest in Great American.

72. On July 24, 1973, Great American received a loan commitment from IIT for a loan in the amount of $8,530,000.

73. Under the IIT loan commitment as revised in the fall of 1973, separate loans were agreed to be made by IIT to Raymond Colliery, Blue Coal, Glen Nan and Olyphant (hereinafter sometimes collectively referred to as the "borrowing

because he was of the view that the transfer to the Gillens and Clevelands of a mortgage of the assets of Raymond Colliery and Blue Coal as security for the purchase price of the stock would be susceptible to a challenge by creditors as a fraudulent conveyance.

64. Besides serving as counsel to the Gillens and Clevelands during 1973, Bernard Brown was also Chairman of the Board of Raymond Colliery.

65. As a result of Durkin's difficulties in obtaining financing, Hyman Green, a wealthy entrepreneur, was brought . into the transaction by Hoffa in the summer of 1973. Hoffa sought Green's participation because he was of the view that Green would be more adept than Durkin at obtaining financing.

66. Green became a 10% shareholder in Great American. The remaining shares of Great American were held 50% by Zafft and 40% by Durkin.

67. During the summer of 1973, the services

companies") in an aggregate amount of $8,530,000. These loans were to be secured by encumbrances on assets of the borrowing companies.

74. The borrowing companies as well as Gillen Coal, Moffat, Northwest, Minindu, Gilco, Maple City, Powderly, Olyphant Premium, Clinton and Carbondale (hereinafter the "guarantors") each agreed to execute mortgages guaranteeing payment of the $8,530,000 loan secured by encumbrances on the assets of the guarantors (hereinafter the "guarantee mortgages").

75. IIT set up an interest reserve of $1,530,000 to relieve the debtors of initial interest payments.

76. James Hillary, IIT's chief in-house counsel, discussed with Walter M. Strine, Jr., counsel to IIT and a member of the firm Morgan, Lewis and Bockius, Messrs. Gellis and Taub, IIT Trustees, and John Streiker, the IIT loan administrator, the possibility that the proposed loan was structured in a manner that might hinder the collection efforts of the Raymond Group's

present and future unsecured creditors.

77. Rosenn, Jenkins and Greenwald discussed with counsel for IIT the substance of the conversations described in Finding of Fact No. 58.

78. By letter of September 26, 1973, Walter M. Strine, Jr., advised James Hillary that creditors might challenge IIT's security interest in the property of the borrowing companies because the bulk of the IIT loan proceeds was to be used to pay the selling shareholders for their stock. Mr. Strine further advised IIT that the guarantee mortgages were vulnerable to a challenge by creditors of the guarantors.

79. On October 13, 1973, using assumptions far more optimistic than those which reasonably could be drawn from Blue Coal's financial statement for the year ending June 30, 1973, John Streiker forecast that, with the imposition of the proposed IIT liability, Blue Coal would have cash deficits of $704,000 by 1976 and of $904,000 by 1977.

80. In addition to the loan promised by IIT, Durkin obtained approximately $3,452,250 in

additional loans to be used for the purchase of Raymond Colliery's stock. These loans were made by lenders either to James Durkin, Sr. and Anna Jean #urkin, who then lent the funds to Great American, or directly to Great American.

81. The following funds used to acquire Raymond Colliery's stock were obtained from loans reflected on Great American's books as payable to James J. and Anna Jean Durkin:

Edward & James Durkin, Jr.	$400,000
First Valley Bank	85,000
United Penn Bank	100,000
Wyoming National Bank	955,000
Eugene Zafft	188,000
No. 1 Contracting Co.	200,000
Mr. Tedesco and/or individuals 150,000	
J.J. Durkin, Sr.	165,0#0
Thrift Credit	394,230

82. The following funds were obtained from loans reflected on Great American's books as payable directly to the lenders:

William B. Evans	300,000
Old Forge Bank	205,000
Wyoming National Bank	105,000
Hyman Green	205,000

83. The closing of the IIT loan was first scheduled for October 31, 1973. The scheduled closing was preceded by a week of loan negotiation sessions between representatives of Great American, IIT and the Gillens and Clevelands.

84. The representatives of Great American during the loan negotiation sessions were Durkin, his counsel, Rosenn, Jenkins and Greenwald, attorney Eugene Zafft, counsel for Hoffa, and James Millard, counsel for Green.

85. IIT was represented during the loan negotiation sessions by attorneys Walter Strine and Christian Day of Morgan, Lewis and Bockius and attorney Bernard Jacob of Fried, Frank, Harris, Shriver and Jacobsen.

86. The Gillens and Clevelands were

represented by Bernard J. Brown, Esq. and Royal Cleveland at the loan negotiation sessions.

87. During the loan negotiation sessions preceding the closing scheduled for October 31, 1973, the representatives of IIT, Great American and the Gillens and Clevelands were all aware of the legal problems encountered when encumbering a corporation's assets to finance the purchase of its own stock. In particular, the representatives of Great American, IIT and the Gillens and Clevelands were concerned with the possibility of Raymond Group creditors challenging the proposed IIT loan under the Bankruptcy Act and the Pennsylvania Uniform Fraudulent Conveyances Act.

88. At the loan negotiation sessions preceding the closing scheduled for October 31, 1973, Walter M. Strine, Jr., Christian Day and Bernard Jacob spent approximately 50 hours discussing among themselves and with members of the firm of Rosenn, Jenkins and Greenwald the impact of the Pennsylvania Uniform Fraudulent Conveyances Act upon the loan.

89. The closing scheduled for October 31, 1973 (hereinafter "aborted closing") was aborted by Walter M. Strine, Jr., counsel for IIT, after consultation with his client, for the following reasons:

(a) Strine suspected that unknown individuals were involved with Great American and that there were undisclosed additional sources of financing for the stock purchase.

(b) The Gillens and Clevelands produced shortly before. the aborted closing financial statements for fiscal year ending June 30, 1973, which revealed additional liabilities of the Raymond Group of which IIT had previously not been aware and which created considerable uncertainty about the financial condition of the Raymond Group and its ability to meet its cash needs over the next three to five years.

90. In anticipation of the closing scheduled for October 31, 1973, mortgages and other security

instruments in the amount of $8,530,000 were executed in favor of IIT by James Durkin as president of Raymond Colliery and recorded in numerous offices of Recorders of Deeds. The Gillens and Clevelands were aware that these mortgages and security instruments had been recorded and demanded their removal from the records in the several offices of Recorders of Deeds after the aborted closing.

91. After the aborted closing, and in response to IIT's concern that an undisclosed principal was involved in Great American, the stock of Great American was agreed to be issued solely in the names of Green and Durkin.

92. In order to protect Hoffa and to secure his contributions towards the purchase, Durkin and Green executed to Zafft as agent for Hoffa an option to purchase 50% of the shares of Great American.

93. Hoffa's involvement was never known to IIT; however, rumors that he was involved with Great American circulated at the offices of IIT.

94. Hoffa was known to be involved by Messrs. Greenwald and Savitz of Rosenn, Jenkins and Greenwald, Charles Parente, Bernard Brown and Royal Cleveland.

95. After the aborted closing, further negotiations took place between IIT and the borrowers, including those at two meetings at the offices of IIT on November 9, 1973 and November 15, 1973.

96. At the November 9, 1973 meeting, Charles Parente, financial advisor to Durkin presented a business plan to IIT and to George Judy, a coal expert engaged by IIT, outlining proposed improvements by the Raymond Group in coal production and real estate sales which would result in increased income to the companies.

97. The business plan drafted by Charles Parente, when adjusted for mathematical errors and changes subsequently made to the IIT loan terms, predicted that the Raymond Group would have substantial cash deficits within 2 years of the making of the IIT loan.